Supreme Court, U. S.
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In the Supreme Court of the United States

No. 75-595

BERNARD SALERA and the UNITED STATES LABOR PARTY,

Respondents

v.

C. DOLORES TUCKER, Secretary of the Commonwealth of Pennsylvania and THE COMMISSIONERS OF ELECTIONS OF THE COMMONWEALTH OF PENNSYLVANIA AND OF THE CITY OF PHILADELPHIA AND WILLIAM SYKES,

Petitioners

THOMAS E. WELSH, Individually and on Behalf of a Class of Registered Voters of Pennsylvania and CONSUMER PARTY and MAX WEINER, Individually and on Behalf of a Class of Registered Voters of Pennsylvania,

Respondents

v.

C. DOLORES TUCKER, Secretary of the Commonwealth of Pennsylvania and FRANCIS B. PATTERSON, Chairman, EUGENE E. J. MAIER and LOUIS MENNA, City Commissioners, Constituting the Board of Elections of the City and County of Philadelphia, Pennsylvania,

Petitioners

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

OTHER AUTHORITIES:

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania, sitting as a three-judge court, in Civil Action Numbers 74-2340 and 74-2353, appears in Appendix A hereto (App. 8-26).

ORDERS BELOW

The order of July 31, 1975 of the United States District Court for the Eastern District of Pennsylvania, sitting as a three-judge court and the amended order of August 6, 1975, in Civil Action Numbers 74-2340 and 74-2353, appear in Appendices B and C hereto (App. 27-31).

JURISDICTIONAL STATEMENT

These actions were instituted pursuant to 28 U.S.C. §1331(a); 28 U.S.C. §1343(3) and 42 U.S.C. §1983; and 28 U.S.C. §1334. On September 25, 1974 a three-judge district court was empanelled pursuant to 28 U.S.C. §2284.

The United States District Court for the Eastern District of Pennsylvania entered its order on July 31, 1975 and subsequently filed an amended order on August 6, 1975. Notice of appeal was filed in the United States District Court for the Eastern District of Pennsylvania on August 15, 1975.

Jurisdiction of this Court is conferred by 28 U.S.C. §1253, which allows for direct appeals to the Supreme Court from an order in a suit required by an Act of Congress to be heard and determined by a district court of three judges.

The statute principally involved is the Act of Legislature of the Commonwealth of Pennsylvania, 1937 June 3, P. L. 1333, Art. IX, §953; 1945 March 9, P. L. 29, §5; 1947 March 5, P. L. 35, §1; 1951, March 6, P. L. 3, §9; 1963 August 13, P. L. 707, §12 (25 P.S. §2913(b) and 25 P.S. §2913(c)); which is set forth in Appendix D (App. 32-35).

QUESTIONS PRESENTED

(a) Whether the United States District Court for the Eastern District of Pennsylvania, sitting as a three-judge court pursuant to 28 U.S.C. §2284, committed error in ruling that, under the Pennsylvania Election Code, the requirement that candidates of political bodies collect signatures for their nomination papers between the tenth and seventh Wednesdays prior to the primary election, and file such nomination papers no later than the seventh Wednesday prior to the primary election, violated a constitutional right secured by the United States Constitution?

(b) Whether the United States District Court for the Eastern District of Pennsylvania, sitting as a three-judge court pursuant to 28 U.S.C. §2284, committed error in establishing a new date for which candidates of political bodies could file their nomination papers?

STATEMENT OF THE CASE

Plaintiffs in *Salera, et al. v. Tucker, et al.*, C.A. No. 74-2340, are the United States Labor Party and Bernard Salera, a Labor Party candidate for United States Congressman in the November, 1974 election. Plaintiffs in *Welsh, et al. v. Tucker et al.*, C.A. No. 74-2353, are Thomas E. Welsh, a registered voter of Pennsylvania's Sixth Senatorial District who sought nomination as an independent candidate for State Senator for the district in the November, 1974, election; Max Weiner, a registered voter in the City and County of Philadelphia who has in the past been a candidate of the Consumer Party for various political offices; and the Consumer Party, a political body in the Commonwealth of Pennsylvania, which nominates its candidates through signed nomination papers rather than through primary elections (Act of 1937, June 3, P. L. 1333, Art. VIII, §801, as amended; 25 P.S. §2831).

Relying on previously litigated cases, *Peoples Party v. Tucker*, 347 F. Supp. 1 (M.D. Pa. 1972) (three-judge court) and *Consumer Party v. Tucker*, 364 F. Supp. 594 (E.D. Pa. 1973) (single-judge court), as well as statements made by employees of defendant C. Dolores Tucker, Secretary of the Commonwealth for the Commonwealth of Pennsylvania, nomination papers filed on behalf of plaintiffs were filed beyond the date prescribed by the Act of the Legislature of the Commonwealth of Pennsylvania 1937, June 3, P. L. 1333, Art. IX, §953, as amended, 25 P.S. §2913(c). In both *People's Party v. Tucker*, supra, and *Consumer's Party v. Tucker*, supra, the Courts

ruled that the Act of 1937, June 3, P. L. 1333, Art. IX, §953, as amended, 25 P.S. §2913(b) was unconstitutional.

Attacks on the filing of the plaintiffs' nomination papers were instituted in the Commonwealth Court of Pennsylvania, and that Court struck the plaintiff candidates' nomination papers because of their untimeliness under 25 P.S. §2913(c). Plaintiffs sought relief in the United States District Court for the Eastern District of Pennsylvania.

On September 24, 1974 an order, pursuant to 28 U.S.C. §2284, was filed and a three-judge court was empanelled. After a hearing on September 19, 1974 before the Honorable Clarence Newcomer, and a hearing and argument on September 25, 1974 before the three judges of the panel, the three-judge district Court entered an order on October 9, 1974 ordering the Defendant C. Dolores Tucker to certify to the Boards of Elections of Philadelphia and Bucks Counties, Pennsylvania all independent candidates who filed nomination papers on or before August 14, 1974.

Prior to the October 9, 1974 order, but after plaintiffs had filed their complaints, a three-judge district court for the Middle District of Pennsylvania, the same district in which Pennsylvania's filing deadline was first found unconstitutional, declared that the earlier decision was no longer valid and that the statutory deadline was constitutional. *Williams v. Tucker*, 382 F. Supp. 381 (M.D. Pa. 1974). The *Williams* Court relied heavily on the decision of the United State Supreme Court in *Storer v. Brown*, U.S. , 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974).

On February 11, 1975 a hearing on the merits was held in these two actions. By order dated July 31, 1975,

as amended, August 6, 1975, the United States District Court for the Eastern District of Pennsylvania enjoined the defendants from enforcing the provisions of 25 P.S. §§2913(b) and (c) against any of the plaintiffs or the classes which they represent. The Court established August 21, 1975, and August 21 on each successive year, as the deadline for collecting signatures and filing nomination papers of political bodies and independent candidates for public office. The plaintiffs and the classes which they represent are enumerated as follows: Max Weiner and the Consumer Party; the class of qualified and duly registered voters residing in the Eastern District of Pennsylvania who wish in the future to consider candidates on the ballot representing policies and programs of the Consumer Party and other political bodies; the class of persons residing in the Eastern District of Pennsylvania who intend in the future to be such candidates; and the class of such political bodies located in the Eastern District of Pennsylvania which intend in the future to support such candidates.

By its order, the United States District Court for the Eastern District of Pennsylvania has disregarded the opinions of the United States District Court for the Middle District of Pennsylvania in *Williams v. Tucker,* supra, and the United States Supreme Court in *Storer v. Brown,* supra. Furthermore, the United States District Court for the Eastern District of Pennsylvania has created a dichotomy, in that for all of the counties outside those areas within Eastern District Court's jurisdiction the filing deadlines remain as stated in 25 P.S. §§2913(b) and (c), while in the Eastern District the filing deadline has been extended to August 21, 1975 and August 21 in each successive year. Finally, by establishing a new deadline for the collection

and filing of nomination papers, the United States District Court for the Eastern District of Pennsylvania has legislated in areas where the Commonwealth of Pennsylvania legislature has refused to legislate, and thereby usurped a legislative function and abused its judicial powers.

Respectfully submitted,
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APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

No. 74-2340 Civil Action

Bernard Salera and the United States Labor Party
v.
C. Dolores Tucker Secretary of the Commonwealth of Pennsylvania
and
The Commissioners of Elections of the Commonwealth of Pennsylvania and the City of Philadelphia and William Sykes [Stapleton]

No. 74-2353 Civil Action
Thomas E. Welsh, individually and on behalf of a class of registered voters of Pennsylvania
and
Consumer Party
and
Max Weiner, Individually and on behalf of a class of registered voters of Pennsylvania
v.
C. Delores Tucker, Secretary of the Commonwealth of Pennsylvania
and
Francis B. Patterson, Chairman, Eugene E. J. Maier and Louis Menna, City Commissioners, constituting the Board of Elections of the City and County of Philadelphia, Pennsylvania

MEMORANDUM AND ORDER

Before Adams, Circuit Judge and Huyett and Newcomer, District Judges.

Newcomer, District Judge.

Plaintiffs in *Salera, et al. v. Tucker, et al.*, Civil Action No. 74-2340, are the United States Labor Party and Bernard Salera, a Labor Party candidate for U. S. Congressman in the November, 1974 election and for Philadelphia City Councilman in the upcoming November election. Plaintiffs in *Welsh et al v. Tucker, et al.*, Civil Action No. 74-2353, are the Consumer Party, Max Weiner, a registered voter in the City and County of Philadelphia who has in the past been a candidate of the Consumer Party for various political offices, and Thomas E. Welsh, a registered voter of Pennsylvania's Sixth Senatorial District who sought nomination as an independent candidate for State Senator from the District in the 1974 elections. Both the Labor Party and the Consumer Party are classified as "political bodies" by Pennsylvania law,[1] which means that their candidates may only appear on the ballot through nomination papers signed by a certain number of the registered voters in the district where the candidates

[1]Pennsylvania classifies every political organization which may nominate candidates for elective office into two categories: political parties and political bodies. 25 Purdon's Statutes §2831. A political party is an organization which has polled a sufficiently large number of votes at the preceding general election to entitle it to nominate all its candidates through primary elections. A political body is an organization which has not polled the requisite number of votes at the preceding general election; a political body nominates its candidates through signed nomination papers rather than through primaries.

seek election. Pennsylvania requires that these signatures be collected in a three week period beginning the tenth Wednesday before the primary and ending the seventh Wednesday prior to the primary. 25 P.S. §§2913(b) and (c). This means that a political body may begin gathering signatures on nomination papers 239 days before the general election (265 days in a presidential election year) and must file these papers no later than 218 days before the general election (244 days in a presidential election year).[2] The nomination papers filed on behalf of the candidate plaintiffs for the November, 1974 election were challenged in the state courts on the grounds that they were filed after this statutory period had terminated. Throughout the challenge proceedings plaintiffs asserted that the statutory deadline had been found unconstitutional by two lower federal courts,[3] and that these courts had established a new filing date of August 14, which was to govern the filing of nomination papers until the state legislature created a new filing date. The state court struck the plaintiff candidates' nomination papers solely because of their untimeliness under §2913(c) and plaintiffs sought relief in this Court. Between the time plaintiffs filed their complaints and the time their cases were heard, a three-judge court in the Middle District of Pennsylvania, the same district in which Pennsylvania's filing deadline was first found unconstitutional, declared

[2] Pennsylvania holds its primary on the third Tuesday in May preceding each general election, except for those years when a President of the United States is nominatd, when it is held on the fourth Tuesday of April.

[3] *People's Party v. Tucker*, 347 F. Supp. 1(M.D. Pa. 1972) (three-judge court); *Consumer Party v. Tucker*, 364 F. Supp. 594 (E.D. Pa. 1973) (single judge court).

that the earlier decision was no longer valid and that the statutory deadline was constitutional. *Williams v. Tucker*, 382 F. Supp. 381 (M.D. Pa. 1974). Upon a showing that plaintiffs had relied on the earlier decisions establishing the August 14 date as well as on statements by employees of defendant Tucker confirming that date, we ordered that plaintiffs and others similarly situated should appear on the ballot if their nomination petitions were filed by August 14, 1974 and were otherwise in order. Consideration of the merits of plaintiffs' constitutional claims was postponed pending the 1974 elections.

A hearing on the merits was held on February 11, 1975. Plaintiffs maintained that the time requirements of 25 P.S. §2913(b) and §2913(c) substantially and unconstitutionally burden their access to the ballot. Specifically, plaintiffs challenged the three week time period provided by these sections as too short and too remote from the general election to allow small parties to gather the necessary signatures without imposing undue hardship on their members, candidates and canvassers. In addition, the *Welsh* plaintiffs contended that the provision of the Pennsylvania Election Code giving primary candidates three weeks in which to gather the requisite signatures for primary nomination petitions while requiring that independent candidates gather a greater number of signatures within the same time frame violates the Equal Protection Clause of the Fourteenth Amendment. In lieu of offering testimony at the hearing, the parties stipulated as to what certain plaintiffs' witnesses would state if called to testify. The stipulated testimony concentrated primarily on the difficulties encountered in collecting signatures so far in advance of the general election and in the time span alloted by §§2913(b) and (c).

Before we can address the constitutional questions we must be sure that we are still confronted with a live controversy. It is axiomatic that the federal courts will not accept jurisdiction over a controversy which is moot. Before accepting jurisdiction a federal court must be assured that it is not being called upon to decide questions "that cannot affect the rights of the litigants before [it]". *North Carolina v. Rice,* 404 U.S. 244, 246 (1971). Defendants herein assert that the *Salera* matter is moot because the request for injunctive relief in that case was restricted to the past election.[4]

Any discussion of mootness properly begins with a recognition of the Supreme Court's treatment of that issue in the context of constitutional challenges to state election laws. In *Rosario v. Rockefeller,* 410 U.S. 752 (1973), the Court stated that plaintiffs' declaratory judgment action against a primary registration requirement was properly heard by the lower court even though plaintiffs had

[4] The Welsh matter has been certified as a class action pursuant to Federal Rule 23(b) (2), which would indicate that it will continue to affect the interests of the parties to the suit. *Defunis v. Odegaard,* 416 U.S. 312, 314, 40 L. Ed. 2d. 164, 169 (1974). Plaintiff Max Weiner has been certified as the class representative of those qualified and duly registered voters who wish in the future to consider candidates on the ballot representing policies and programs of the Consumer Party and other political bodies, as well as the class of persons intending in the future to be such candidates. Plaintiff Consumer Party has been certified as the representative of the class of political bodies intending in the future to support such candidates. There being no evidence that plaintiff Welsh intends to seek independent nominations in the future, or intends to vote for independent candidates, or intends to represent a class of such candidates or voters, the complaint of plaintiff Welsh will be dismissed as moot.

qualified to vote in succeeding primaries. In *Storer v. Brown,* U.S. , 39 L. Ed. 2d 714 (1974), the Court held that plaintiffs could maintain their suit to have certain state ballot restrictions declared unconstitutional even though the election in which plaintiffs sought to appear on the ballot was long past and that "no effective relief can be provided to the candidates or voters . . ." U.S. , 39 L. Ed. 2d at 727, fn 8. The Court stated:

> ". . . [T]his case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied to future elections. This is therefore, a case where the controversy is 'capable of repetition yet evading review' [citations omitted]. The 'capable of repetition yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." 39 L. Ed. 2d at 727-728, fn. 8.

The above quoted language would remove all questions of mootness except for the failure of the *Salera* plaintiffs to unequivocally request declaratory relief. The Court seems willing to hear cases where injunctive relief is no longer appropriate because declaratory relief will "have the effect of simplifying future challenges"; where, however, declaratory relief is not sought this reasoning may not apply. A fair reading of their complaint leads to the conclusion that they not only sought injunctive relief

for the 1974 election but for subsequent elections as well. Moreover, there is evidence that both the U.S. Labor Party and plaintiff Salera himself are actively seeking access to the ballot for the November, 1975 local election. The combination of the scope of plaintiffs' prayer for relief and their involvement in a post—1974 campaign is persuasive that this suit will achieve the goals set out in *Storer,* supra, and is thus not moot.

The Supreme Court has identified the individual, party, and state interests involved when the state restricts voting, registration, or access to the ballot. In *Williams v. Rhodes,* 393 U.S. 23 (1968), the Court held that Ohio's ballot qualifications, which were so onerous as to make it "virtually impossible" for independent parties to qualify, 393 U.S. at 24, violated the Equal Protection Clause of the Fourteenth Amendment. According to the Court, these ballot restrictions burdened "two different, although overlapping kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." 393 U.S. at 30. The Court recognized substantial state interests in encouraging compromise and political stability, in attempting to ensure that the election winner will represent a majority of the community, and in providing the electorate with an understandable ballot, but reasoned that these objectives could be achieved by less restrictive means than the challenged limitations. 393 U.S. 23, 32-33.

The Court has had numerous occasions since *Williams* to examine the interrelation of these and other interests. In *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969), the Court struck down a New York statute

limiting the franchise in School Board elections to those who either owned (or leased) real property or were parents of school-age children. The Court assuming arguendo the legitimacy of a state interest in limiting the vote to those "primarily affected" by School Board affairs, stated that the statute was not "sufficiently tailored" to achieve this interest. 395 U.S. at 632-633. In *Bullock v. Carter,* 405 U.S. 134 (1972), the Court deemed unconstitutional Texas' requirement that primary candidates pay a registration fee proportionate to the salary paid to the office which the candidate sought. These fees, the stated purpose of which was to finance the primary elections, ranged from $150 for a State Representative representing a sparsely populated district to $1,000 for a U.S. Senator. 405 U.S. 134, 139. The Court stated:

> "Without making light of the State's interest in husbanding its revenues, we fail to see such an element of necessity in the State's present means of financing primaries as to justify the resulting incursion on the prerogatives of voters." 405 U.S. at 149.

In *Dunn v. Blumstein,* 405 U.S. 330 (1972), the Court, again imposing the "strict scrutiny" test of *Williams, Kramer,* and *Bullock,*[5] *supra,* invalidated Tennessee's one-year residency requirement for voting.

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[5] In *Bullock* the Court stated that the existence of barriers to candidate access to the ballot "does not of itself compel close scrutiny", 405 U.S. at 143, because their "initial and direct impact . . . is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review." 405 U.S. at 142-143. Nevertheless, the Court closely scrutinized the candidate filing fees involved in Bullock because of their "real and appreciable impact on the exercise of the franchise . . ." 405 U.S. at 144.

These cases do not stand for the proposition that any state statute which burdens the right to vote or a candidate's access to the ballot is unconstitutional. As the Court stated in *Storer v. Brown,* 39 L. Ed. 2d 714, 723:

> ". . . [T]he States have evolved comprehensive . . . election codes regulating in most substantial ways . . . the time, place, and manner of holding primary and general elections, the registration and qualifications of voters and the selection and qualification of candidates.
>
> It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases. . ."

Indeed, the Court has upheld statutes which substantially restrict the rights of candidates and voters, including a state's requirement that voters who intend to vote in a party primary register 8 months before that primary in a presidential year and 11 months before it in a non-presidential year, *Rosario v. Rockefeller,* 410 U.S. 752 (1973), and a statute barring any person with a registered affiliation with a qualified political party[6] within 12 months of a primary election from seeking nomination as an independent candidate in the general election following the primary.[7] *Storer, supra.* Whether the restrictions challenged herein fail to pass muster under the Court's standard is "very much a matter of degree [citation omitted],

[6] A qualified political party in this context is a political party which nominates its candidates by primaries.

[7] Since in California the primary election precedes the general election by five months, the statute effectively barred the independent candidacy of anyone who had a registered affiliation with a qualified political party within 17 months of the general election.

very much a matter of consider[ing] the facts and circumstances behind the law, the interest which the state claims to be protecting, and the interest of those who are disadvantaged by the classification. [citations omitted]." *Storer, supra,* at 723-724.

The sections of Pennsylvania's election code under attack here are found at 25 Purdon's Statutes §2913(b) and §2913(c). The first of these sections, §2913(b), fixes the tenth Wednesday before the primary election as the date when nomination papers may first be circulated for signature. §2913(b) states:

> "No nomination paper shall be circulated prior to the tenth Wednesday prior to the primary, and no signature shall be counted unless it bears a date affixed not earlier than the tenth Wednesday prior to the primary nor later than the seventh Wednesday prior to the primary."

§2913(c) provides that these petitions must be submitted seven weeks before the primary election. In its entirety, that section reads:

> "All nomination papers must be filed on or before the seventh Wednesday prior to the primary."

Read together, these sections establish a three-week signature gathering period ending 218 days before the general election.[8] Plaintiffs Labor Party, Consumer Party, Bernard Salera, and Max Weiner claim that the shortness of this period, as well as its remoteness from the general election, substantially burdens their ability to gain access to the ballot and thus infringes their First Amendment

[8] This deadline occurs 244 days before election day in a presidential election year.

rights of free association. Plaintiff Weiner claims that the burdens placed on the party and candidate plaintiffs undermine the effectiveness of his right to vote by unduly limiting potential candidates, including the candidate for whom he desired to vote. The right to vote has repeatedly been recognized as "a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). If these electoral regulations burden the exercise of these rights, or at least[9] if they have a "real and appreciable impact" on plaintiff Weiner's right to vote effectively, *Bullock,* supra, at 144, they must be "closely scrutinized", and "found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." *Bullock, supra,* at 144.

As for plaintiffs' claim that Pennsylvania's petition gathering period is unconstitutionally brief, the Supreme Court has suggested that a comparable time period, while constituting a substantial restriction on access to the ballot, is constitutional. In *Storer v. Brown, supra,* the Court was faced with a challenge to California's requirement that an independent Presidential candidate gather, within a 24 days period, nomination petitions signed by no less than 5% and no more than 6% of the total number of votes in the last general election. The Court remanded for a determination of whether the disqualification of those who voted in the primary reduced the number of persons eligible to sign nomination petitions to such an extent that the 5-6% percentage requirement would in fact be higher. In so doing, the Court stated:

> ". . . Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden, Signatures at the rate of 13,820 per day would be required, but 1,000 canvassers could perform the task if each gather 14 signers a day. On its face, the statute would not appear to require an impractical undertaking for one who desires to be a candidate for President. But it is a substantial requirement; and if the additional likelihood is, as it seems to us to be, that the total signatures required will amount to a substantially higher percentage of the available pool than the 5% stipulated in the statute, the constitutional claim asserted by [plaintiff] is not frivolous. Before the claim is finally dismissed, it should be determined whether the available pool is so diminished in size by the disqualification of those who voted in the primary that the 325,000-signature requirement, to be satisfied in 24 days, is too great a burden on the independent candidate for the office of President." 39 L. Ed. 2d at 729.

[9] See fn. 5, *supra.*

A three-judge court has relied on this language in deciding that *People's Party v. Tucker, supra,* fn. 3. and *Consumer Party v. Tucker, supra,* fn. 3., erroneously concluded that the three week period set by §2913(b) and §2913(c) was unconstitutionally short. *Williams v. Tucker,* 382 F. Supp. 386, (M.D. Pa. 1974). The *Williams* Court declared:

> "If it is constitutional to require a presidential candidate to obtain 325,000 signatures in 24 days, *a fortiori* it is constitutional to require a presidential candidate to obtain 35,000 signatures [the signature requirement imposed on an independent presidential candidate in Pennsylvania] in 21 days." 382 F. Supp. at 386.

The *Williams* Court went on to say that the fact that the pool of voters eligible to sign nomination papers was substantially larger in Pennsylvania than in California made it clear that the time limits of §2913 (b) and §2913 (c) were constitutional.

Although it is true the Supreme Court's discussion in *Storer* occurred in the context of a presidential election, while we are presently faced with putative candidates in less-than-statewide elections, we nevertheless conclude that the three week period is constitutional as applied to plaintiffs. Plaintiffs presented no evidence that the three-week period imposes a greater burden on them than it does on an independent candidate for President, nor have they advanced any reason to distinguish Pennsylvania's statutory time period from the one discussed favorably in *Storer*. In the absence of any such evidence or distinguishing characteristics our conclusion that Pennsylvania's three week-time period for gathering signatures on nominating petitions is constitutionally valid seems compelled by *Storer*.

Plaintiffs also argue that the three week limitation violates the Equal Protection Clause because Pennsylvania allows primary candidates a similar 21 day period to gather signatures on primary nomination petitions while requiring these candidates to gather fewer signatures than independent candidates. In order to appear on the primary ballot a would-be candidate must gather a certain number of signatures on nomination petitions. The exact number of signatures required varies according to the office the candidate is seeking, but in no case does it exceed 1,000 signatures. Independent candidates, on the other hand, must obtain signatures equivalent to 2% of the largest entire vote cast for any election candidate in the

preceeding state-wide election. 25 P.S. §2913 (b). (The requirement for a state-wide independent candidacy by nomination papers is approximately 35,000 valid signatures; the requirement for an independent candidate in Philadelphia is between 4,000 and 8,000 valid signatures.)

Indisputably, an independent candidate must receive more signatures in the same time than a primary candidate. However, this distinction does not appear unreasonable since obtaining the necessary valid signatures will assure an independent candidate a place on the final ballot, while meeting the nomination petition requirement will only assure a party candidate a place on the primary ballot, one step removed from the final ballot. We decline to invalidate the 21 day signature gathering period for nomination papers on this basis.

The second half of plaintiffs' challenge to §2913 (b) and §2913 (c) —that the period for gathering signatures on nominating petitions is so remote from the general election that it substantially impairs plaintiffs' ability to appear on the ballot or to vote for otherwise qualified candidates —raises different issues than were raised by plaintiffs' challenge to the three-week limitation. In *Storer* the three week signature gathering period terminated only 60 days before the general election (and 90 days after the primary); in the present case, it ends 218 days before the general election (and 49 days before the primary). There is no question that cutting off signature gathering 218 days before the general election substantially burdens the ability of independent candidates to gain access to the ballot. It forces these candidates to gather signatures before the issues of the upcoming election have been defined. It forces them to complete their signature gathering process in a political vacuum, seven weeks before the major

parties choose their candidates and only two weeks after the deadline for filing as a candidate in the primary election. Scheduling the three week period at such an early date makes plaintiffs' task of generating interest among potential voters or potential canvassers more difficult than it would be if the three week period were scheduled at a point closer to the general election. In addition, it was stipulated that Max Weiner, a past candidate of the Consumer Party, would have testified, if called, that adverse weather conditions generally prevailing during the statutory time period complicate the signature gathering process.

Plaintiffs have shown that the remoteness of the signature gathering period from the general election substantially impairs the ability of plaintiffs' candidates to qualify as eligible independent candidates, and so threatens to keep off the ballot candidates for whom eligible voters wish to cast their vote, thereby creating a "real and appreciable impact on the exercise of the franchise . . .", *Bullock, supra,* at 144. We must therefore closely examine the scheduling of Pennsylvania's signature gathering period in order to determine whether its present dates are necessary to accomplish some compelling state interest.

There are three state interests arguably served by holding the nomination paper circulation period as far in advance of the general election as does Pennsylvania. One possible interest would be the need for sufficient time to resolve any challenges to the nomination papers and to prepare the ballots in a deliberate and orderly fashion. However, the evidence reveals that the Commonwealth of Pennsylvania does not begin to print the ballots until the latter part of September, no more than one and one-half months before the general election, and that a candidate's

name can be added to or removed from the ballots in late September without more than minor inconvenience.

A second possible interest is the state's concern that defeated or disaffected primary candidates not use the independent nomination process to thwart the will of the party majority, or to wreak vengeance upon the candidate chosen by the party majority. This interest was recognized by the Court in *Storer* as sufficiently compelling to justify an outright prohibition against the independent candidacy of any person who had been registered with a qualified political party within seventeen months of the general election in question. By closing the nomination paper process before the primary election, §2913(b) and (c) preclude any primary candidates from running in the general election as independents.

However, even assuming that it is the purpose of §2913(b) and (c) to separate the primary election route to the ballot from the independent route, these sections reach further than is necessary to accomplish this purpose. These sections not only prevent any defeated or dissident primary candidates from gaining access to the ballots as independents, but make it difficult for all independents to get on the ballot, regardless of any association with the primary election process. Pennsylvania could easily exclude defeated primary candidates or dissident party members from the independent nomination process without burdening other independent candidates by requiring that an independent candidate file an affidavit that he was not, nor will be, a candidate in the primary election, or, as in *Storer,* that he was not affiliated with any political party within a certain number of months before the filing date for nomination papers. In fact, the Pennsylvania election code requires that independent candidates file such an af-

fidavit. 25 P.S. §2911(e)(5). While this section will not prevent primary candidates from running as independents in Pennsylvania if the date for filing nomination papers falls after the primary,[10] it does demonstrate that such a statute is feasible. Given the feasibility of a less restrictive alternative to scheduling the signature gathering period so far in advance of the primary, the justification for this scheduling cannot be found in the state's compelling interest in divorcing the party primary candidate selection process from the independent one.

One final possible state interest in the present filing deadline is its interest in the intelligent exercise of the franchise by those voting in the primary. This argument goes as follows: a voter in the primary election can cast his vote more knowledgeably and effectively if he knows which independent candidates will or will not be on the final ballot; requiring nomination papers to be filed far in advance of the primary assures that that the primary voter will know the identity of the independents that will appear on the ballot; therefore, the state is justified in imposing an early filing date. One problem with this argument is that the primary voter will still not know the identity of a much more significant factor in the general election, i.e., the identity of the other major party candidate. Thus a substantial obstacle to an independent candidate's ability to get on the ballot is justified by reference to what is at best a marginal increase in knowledgeable voting. We believe that this state interest is insufficiently compelling to warrant the burden on independent candidacies which results from the early filing date.

[10] 25 P.S. §2911(e)(5) states in pertinent part:

> "There shall be appended to each nomination paper offered for filing an affidavit of each candidate nominated therein, stating . . . (5) that his name has not been presented as a candidate by nomination petitions for any public office to be voted for at the *ensuing* primary election . . . (emphasis added).

Thus this section would not bar the independent candidacy of a person who had been a candidate in a preceeding primary.

We cannot overlook the fact that a three-judge court in this Circuit has expressly declared that §2913(b) and §2913(c) are constitutional. *Williams v. Tucker, supra.* We believe that this decision was correct given the facts that were before that court, but we also believe that the factual situation in our case warrants a different conclusion.

The *Williams* court was confronted with a defeated primary candidate who had gathered a sufficient number of signatures to qualify as an independent, but whose nomination papers had been rejected by the state since they had not been gathered within the three week period of §2913(b) or filed by the date set forth in §2913(c). In addition, these nomination papers had not been accompanied by an affidavit stating that the affiant was not also submitting primary nomination petitions for the same office, an affidavit which 25 P.S. §2911(e)(5) requires all persons submitting nomination papers to file. The plaintiff, who had been defeated in his party's 1974 congressional primary election, argued that the *People's Party* and *Consumer Party, supra,* had extended the time for filing nomination papers until August 14, 1974, and that §2911(e)(5) was unconstitutional because it prevented a loser in the primary from running as an independent in the general election. The court first found that §2913(b) and (c) were "inherently involved" in the legal issues raised in the case, 382 F. Supp. at 384, presumably because these sections, if constitutional, prevented plain-

tiff from filing as an independent after the primary regardless of the validity of §2911(e)(5). The court declared that the reasoning of *People's Party* and *Consumer Party, supra,* had been undermined by the Supreme Court's validation of California's 24 day signature gathering period in *Storer, supra,* and that therefore §2913(b) and (c) were constitutional and the August 14 date was no longer in effect. The *Williams* court held that the fact that the filing date of §2913(c) prevented a losing primary candidate from running as an independent candidate did not violate the constitution, since the Supreme Court in *Storer* had upheld a statutory provision expressly barring defeated primary candidates from the independent nominating process. 382 F. Supp. 381, 387.

In *Williams* the challenge to the constitutionality of §2913(b) and (c) came from a defeated party candidate. This candidate presented no evidence about the difficulties of gathering sufficient signatures seven weeks before the primary; in fact, he was completely unconcerned with §2913's effect on bona fide independent associations or candidates. The present case, however, involves interests which were not present nor considered in *Williams.* Plaintiffs herein are precisely those persons whose rights are unnecessarily infringed by the provisions which legitimately barred persons such as Congressman Williams from the ballot, and as applied to these plaintiffs §2913(c) and §2913(b), insofar as the latter disqualifies papers signed after the seventh Wednesday prior to the primary, are unconstitutional.

(s) ARLIN M. ADAMS, JR.
(s) DANIEL H. HUYETT, 3RD,
J.
(s) CLARENCE C. NEWCOMER,
J.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

No. 74-2340 Civil Action

Bernard Salera and the United States Labor Party

v.

C. Dolores Tucker, Secretary of the Commonwealth of Pennsylvania, et al

No. 74-2353 Civil Action

Consumer Party
and
Max Weiner, Individually and on behalf of a class of registered voters of Pennsylvania

v.

C. Delores Tucker, Secretary of the Commonwealth of Pennsylvania, et al

ORDER

And Now, to wit, this 31st day of July, 1975, upon consideration of the evidence and arguments presented

by counsel at a hearing on this matter on February 11th, 1975, and upon consideration of the briefs filed by the parties both at and after that hearing, it is hereby ordered that the defendants, their agents, employees, and servants, are hereby permanently enjoined from enforcing against any of the named plaintiffs in the above captioned actions the provisions of 25 P.S. §2913(c) or §2913(b), insofar as the latter section prohibits the counting of a signature on a nomination paper if it bears a date affixed later than the seventh Wednesday prior to the primary to be held in the year in which the nomination paper is circulated.

Defendants, their agents, employees, and servants, are hereby permanently enjoined from printing or otherwise preparing any ballot without the names of the candidate plaintiffs or any candidates offered by plaintiff political bodies if those candidates nomination papers are filed with defendant Tucker on or before August 21st, 1975 and/or the August 21st of each successive year in which these candidates seek nomination as independents, those nomination papers bear a signature with a date affixed of no later than August 21st, and those nomination papers are otherwise in conformity with the Pennsylvania Election Code. This August 21st date shall remain in effect until the Pennsylvania legislature shall enact a new filing date for nomination papers.

And it is so ordered.

(s) ARLIN M. ADAMS, J.
(s) DANIEL H. HUYETT, 3RD, *J.*
(s) CLARENCE C. NEWCOMER, *J.*

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

No. 74-2340 Civil Action

Bernard Salera and the United States Labor Party

v.

C. Dolores Tucker, Secretary of the Commonwealth of **Pennsylvania, et al**

No. 74-2353 Civil Action

Consumer Party
and
Max Weiner, individually and on behalf of a class of registered voters of Pennsylvania

v.

C. Delores Tucker, Secretary of the Commonwealth of Pennsylvania, et al

AMENDED ORDER

And Now, to wit, this 6th day of August, 1975, upon consideration of the evidence and arguments presented by

counsel at a hearing on this matter on February 11, 1975, and upon consideration of the briefs filed by the parties both at and after that hearing, it is hereby ordered that the defendants, their agents, employees, and servants, are hereby permanently enjoined from enforcing against any of the named plaintiffs in the above captioned actions or against any member of the classes which the named plaintiffs Consumer Party and Max Weiner have been certified to represent by this Court's Order of July 31, 1975, to wit, the class of qualified and duly registered voters residing in the Eastern District of Pennsylvania who wish in the future to consider candidates on the ballot representing policies and programs of the Consumer Party and other political bodies; the class of persons residing in the Eastern District of Pennsylvania who intend in the future to be such candidates; and the class of such political bodies located in the Eastern District of Pennsylvania which intend in the future to support such candidates, the provisions of 25 P.S. §2913(c) or §2913(b), insofar as the latter section prohibits the counting of a signature on a nomination paper if it bears a date affixed later than the seventh Wednesday prior to the primary to be held in the year in which the nomination paper is circulated.

Defendants, their agents, employees, and servants, are hereby permanently enjoined from printing or otherwise preparing any ballot without the names of the candidate plaintiffs or members of the class of candidates or any candidates offered by plaintiff political bodies or any member of the class of political bodies if those nomination papers for such candidates and political bodies are filed with defendant Tucker or with a Board of Elections for a County within the Eastern District of Pennsylvania, on or before August 21, 1975 and on the August 21st of each

successive year in which these candidates seek nomination as independents, those nomination papers bear signatures with dates affixed no later than August 21st, and those nomination papers are otherwise in conformity with the Pennsylvania Election Code. This August 21st date shall remain in effect until the Pennsylvania legislature shall enact a new filing date for nomination papers.

And it is so ordered.

(s) ARLIN M. ADAMS,
J.
(s) DANIEL H. HUYETT, 3RD,
J.
(s) CLARENCE C. NEWCOMER,
J.

APPENDIX "D"

25 §2912

ELECTIONS, ETC.

* * * * * * * *

§2913. Place and time of filing nomination papers

(See main volume for text of (a))

(b) No nomination paper shall be circulated prior to the tenth Wednesday prior to the primary, and no signature shall be counted unless it bears a date affixed not earlier than the tenth Wednesday prior to the primary nor later than the seventh Wednesday prior to the primary. As amended 1963, Aug. 13, P. L. 707, §12.

(c) All nomination papers must be filed on or before the seventh Wednesday prior to the primary. As amended 1963, Aug. 13, P. L. 707, §12.

Effective Jan. 1, 1964.

Supplementary Index to Notes

Validity ½

½. Validity

The number of signatures on nomination papers required of a political body by §2911, namely, two per cent of the largest vote cast for any elected candidate in the state, is not unreasonable; however, requirement of this section that the signatures be obtained in a three-week period beginning 265 days before the election at which the candidate's name appears for the first time thereafter

on the ballot designates a period which is so short and so remote from the election as to be unreasonable and violate of the First and Fourteenth Amendments. People's Party v. Tucker, 347 F. Supp. 1, D.C. 1972

2. Time of filing nomination papers

Where previous action in which three-judge court declared provision of Pennsylvania Election Code regulating time for obtaining signatures for nomination papers to be unconstitutional and void was deemed by court to be closed and concluded, so that relief granted as to any election subsequent to election of 1972 was to be obtained in a separate and new civil action, court in instant action, in order to prevent a denial of equal protection to independent candidates and political bodies, would declare statute to be unconstitutional and void as to each succeeding election until such time as General Assembly of Pennsylvania enacted a constitutional time limitation. Consumer Party v. Tucker, 364 F. Supp. 594 D.C. 1973.

Portion of previous judgment which declared that provision of Pennsylvania Election Code regulating time for obtaining signatures on nomination papers was unconstitutional and void as to plaintiffs and class of voters they represented was not limited by language of judgment merely to statewide offices or limited merely to those offices in which nomination papers were to be filed with the secretary of the Commonwealth as opposed to those offices in which nomination papers were to be filed with a county board of elections. Id.

Since provision of Pennsylvania Election Code regulating time for obtaining signatures on nomination papers was previously declared to be unconstitutional and void by a three-judge court, factual question as to whether

plaintiffs had capacity to circulate and file nomination papers within time limit set by statute was not relevant and plaintiffs were not thereby barred from obtaining equitable relief. Id.

Term "nomination papers," within provision of Pennsylvania Election Code regulating time for obtaining signatures on nomination papers, refers to documents to be submitted for filing by independent political bodies (those political groups which have not obtained sufficient votes in prior election to qualify as political parties and hold primary elections) in order to place on ballot in November election nominees of such political bodies. Id.

Where defendant, in her capacity as chief elections officer of Commonwealth of Pennsylvania, was a party to previous federal action wherein provision of Pennsylvania Election Code regulating time for obtaining signatures on nomination papers was declared unconstitutional and void as to plaintiffs and class of voters they represented, she and Commonwealth were bound by prior judgment. Id.

Judgment in previous federal action that provision of Pennsylvania Election Code regulating time for obtaining signatures on nomination papers was unconstitutional and void with respect to plaintiffs and class of voters they represented concluded rights of parties and their privies, and regardless of whether second action between same parties, or those in privy with them, was upon a different claim, prior judgment operated as an estoppel as to those matters in issue upon determination of which prior finding was rendered. Id.

Defendant city commissioners were precluded by doctrine of res judicata from asserting that provision of Pennsylvania Election Code regulating time for obtaining signatures on nomination papers was valid and constitutional as applied to plaintiffs and class of voters they represented, where commissioners were not only in a sufficiently "close relationship" with the secretary of the Commonwealth, named as defendant in a prior action which resulted in a judgment that this section was unconstitutional and void, but also derived their authority solely from state statute, which made them the equivalent of successors in interest to secretary as to all relevant issues present in instant litigation. Id.

Where provision of Pennsylvania Election Code regulating time for obtaining signatures on nomination papers had previously been declared unconstitutional and void by a three-judge court so as to conclude rights of parties and their privies, and General Assembly of Pennsylvania had failed to enact new and valid time limitations, so that no valid time limitation existed as to filing of nomination papers, nomination papers submitted by plaintiffs were to be considered as timely, and refusal of defendant city commissioners, who constituted board of elections, to receive such papers and place plaintiff's nominee on ballot as a candidate constituted a violation of plaintiffs' constitutional rights for which they were entitled to equitable relief. Id.

And special time limitation made applicable only to Philadelphia county in respect to filing of nomination papers by a county board of elections would violate Constitution of Pennsylvania providing that all laws regulating the holding of elections by citizens or for the registration of electors, shall be uniform throughout the Commonwealth, except that laws regulating and requiring the registration of electors may be enacted to apply to cities only. Id.

Supreme Court, U. S.
FILED
DEC 19 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-595

C.DELORES TUCKER, Secretary of the Commonwealth of Pennsylvania, THE COMMISSIONERS OF ELECTIONS OF THE COMMONWEALTH OF PENNYSYLVANIA AND THE CITY OF PHILADELPHIA; and WILLIAM SYKES,

Appellants

v.

BERNARD SALERA and THE U.S. LABOR PARTY and MAX WEINER and THE CONSUMER PARTY,

Appellees

MOTION TO AFFIRM

David S. Heller
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INDEX

I. CASES

II. STATUTES

III. STATUS OF THE CASE

The Opinion below has been reported *sub nom Salera v Tucker* 399 F Supp 1258(1975). The instant appeal has been taken pursuant to 28 USC 1253.

AND NOW COME Appellees Bernard Salera and the U.S. Labor Party by their attorney David S. Heller, and move this Court for an Order affirming the judgement of the Court below and dismissing the appeal taken by Appellants herein. In support thereof Appellees state as follows.

1. As fully stated in Appellees *Motion* and *Memorandum of Law in Opposition to Appellants Motion to Stay the Effect of Injunction Pending Appeal*, the statutes under attack, 25 P.S. 2913 (b) and (c) (hereinafter the law) have been previously considered several times by the Federal Courts, as long ago as 1972. In each such case, Appellant Tucker appeared and fully argued her position. In each case, with the exception of *Williams v Tucker* 382 F Supp386 (M.D.Pa. 1974), the third such case, the law was declared invalid. *Williams v Tucker*, as the Three-Judge Court below found, was decided on different grounds than are present herein.

2. Appellant Tucker has been previously held to be bound by the previous decisions in *Peoples Party v Tucker* 347 F Supp 1, (1972) (Three-Judge Court) and *Consumers Party v Tucker* 364 F Supp

594 (1973) under principles of *res judicata*.

3. It offends basic notions of due process that Appellant Tucker be allowed to litigate a case to an adverse conclusion three times before appealing. Therefore, this Court should reject said appeal.

4. This Court has held that there is no sufficient state interest in forcing political bodies which do not enter candidates in primary elections to file nominating petitions before said primary elections. *Storer v Brown* 415 US 724,738-744 (1974). The law under attack requires such political bodies to submit nominating petitions 49 days before the primary elections.

5. This Court has held that there is no sufficient state interest in requiring political bodies which do not enter candidates in primary elections to submit nominating petitions over 60 days prior to the general elections. *Storer v Brown* supra. The law under attack requires such political bodies to submit nominating petitions 218 days before the general elections.

6. Requiring political bodies to gain access to the ballot for the general elections by circulation of nominating petitions during a three week period

starting ten weeks before the primary elections, which period of time ends 218 days prior to the general elections is Unconstitutional as:

(a) Irrational and unrelated to any bona fide State interest in that there is no reason for such period to be related to the primary elections date, where persons cannot participate, or can by legislation be banned from participating in both forms of nomination.

(b) Depriving political bodies of their First Amendment, Equal Protection, and Due Process rights in that said period is so remote from the general election that political bodies are faced with the onerous burden of seeking signatures for an election wherein the issues and personalities are not yet clear nor a matter of intense public interest, in inclement weather, and in an unduly short period of time.

(c) Assuming *arguendo* that a bona fide states interest exist in placing burdens on access to the ballot and so limiting the free choice of the electorate, the law under attack does not represent the least restrictive mode of fulfilling such state interest. *Williams v Rhodes* 393 US 23, 32-33 (1968);

Kramer v Union Free School District 395 US 621 (1969); *Bullock v Carter* 405 US 134 (1972); *Dunn v Blumstein* 405 US 330 (1972).

7. The Three-Judge Court correctly applied the law, and no error was committed by said Court herein.

WHEREFORE, Appellees pray this Court issue an Order affirming the judgement of the Court below, and dismissing Appellants' Appeal herein.

Respectfully Submitted,

David S. Heller

David S. Heller
Attorney for Appellees
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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1975

NO. 75-595

C. DELORES TUCKER et al,
Appellants
v.
BERNARD SALERA and
THE U.S. LABOR PARTY,
Appellees

AFFIDAVIT IN SUPPORT
OF MOTION TO AFFIRM

DAVID S.HELLER being duly sworn, deposes and says:

1. I am the attorney for the Appellees in the above-entitled action. I make this affidavit in support of the Appellees Motion to Affirm the Judgement of the Three-Judge Court.

2. The factual allegations set forth in the attached Motion to Affirm are true to my knowledge except as to matters stated therein to be alleged on information and belief, and as to those matters I believe them to be true.

3. Service of the attached papers was made by depositing a true copy of the same in a mail box

maintained exclusively by the United States Postal Service, enclosed in a postage paid envelope addressed to the respective counsel herein, as listed on the attached list.

David S. Heller

David S. Heller

Michael Minkin Esquire
Room 206 State Office Building
Philadelphia, Pa. 19130

Gregory Harvey Esquire
2107 The Fidelity Building
Philadelphia, Pa. 19109

Larrick Stapleton Esquire
1738 PNB Building
Philadelphia, Pa. 19107

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Supreme Court, U. S.
FILED
DEC 15 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

NO. 75-595

C. DELORES TUCKER, Secretary of the Commonwealth of Pennsylvania and WILLIAM SYKES,

Appellants

v.

BERNARD SALERA and the UNITED STATES LABOR PARTY and THOMAS E. WELSH, Individually and on Behalf of a Class of Registered Voters of Pennsylvania and CONSUMER PARTY and MAX WEINER, Individually and on Behalf of a Class of Registered Voters of Pennsylvania,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION OF APPELLEES MAX WEINER AND CONSUMER PARTY TO AFFIRM

GREGORY M. HARVEY

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Attorney for Appellees
Max Weiner and
Consumer Party

Index

CITATIONS

CASES:

STATUTES:

IN THE SUPREME COURT OF THE UNITED STATES

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Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION OF APPELLEES MAX WEINER AND CONSUMER PARTY TO AFFIRM

OPINION BELOW

The opinion below is reported at 399 F. Supp. 1258 (Appendix ("App.") to the Jurisdictional Statement 9) and

the Amended Order dated August 6, 1975, is reported at 399 F. Supp. 1269 (App. 29).

JURISDICTION

This is a direct appeal pursuant to 28 U.S.C. § 1253 from an order entered August 6, 1975, by a three-judge district court convened pursuant to 28 U.S.C. § 2284. The notice of appeal was filed August 15, 1975.

QUESTIONS PRESENTED

1. Where the Constitutionality of state restrictions on ballot position for independent political candidates is challenged by plaintiffs certified to represent separate classes of independent voters, independent candidates, and political bodies desiring to support such candidates, does the validity of such state restrictions depend upon whether they are necessary to further compelling state interests?

2. Where no substantial state interest, much less a compelling state interest, can be discerned to sustain the restrictive time limitation the enforcement of which was enjoined by the district court, should the decision below be affirmed?

STATUTE INVOLVED

The court below enjoined enforcement of the time limitation on filing of nomination papers to obtain ballot position for independent candidacies, Pennsylvania Election Code of 1937, as amended August 13, 1963, P.L. 707, § 12, 25 Purdon's Pa. Stat. Ann. § 2913(b) and (c), as follows:

> "(b) No nomination paper shall be circulated prior to the tenth Wednesday prior to the primary, and no signature shall be counted unless it bears a date affixed not earlier than the tenth Wednesday prior to the primary nor later than the seventh Wednesday prior to the primary."

> "(c) All nomination papers must be filed on or before the seventh Wednesday prior to the primary."

STATEMENT

This appeal is from the most recent of four decisions concerning the Constitutionality of Pennsylvania's restrictions on the time period within which to circulate and file nomination papers to obtain ballot positions for independent candidacies. Although an independent political group (referred to in the Pennsylvania Election Code as a "political body," in contrast to an established "political party," 25 Purdon's Pa. Stat. Ann. § 2831) is not allowed to participate in the primary election held on the third Tuesday of May in ordinary years and held on the fourth Tuesday of April in Presidential election years, 25 Purdon's Pa. Stat. Ann. §§ 2753 and 2754, the time

limitation for the filing of such nomination papers is the seventh Wednesday prior to the primary, as set forth in Section 2913(c), quoted above.

The statutory limitation restricts the circulation and filing of nomination papers in nonpresidential years to a three-week period which ends 218 days before the November general election and which ends 244 days before the November election in presidential years.

In People's Party v. Tucker, 347 F. Supp. 1 (M.D. Pa. 1972), a three-judge court held, one judge dissenting, that the three-week period was "so short and so remote from the election as to be unreasonable. We have been unable to ascertain any valid purpose to be served by it." 347 F. Supp. at 4. The court's order enjoined enforcement of the time limitations and required the acceptance of nomination papers circulated and

filed on or before August 14, 1972. In Consumer Party v. Tucker, 364 F. Supp. 594 (E.D. Pa. 1973), a single judge, applying the rule of res judicata, held that the decision in People's Party applied also in the Eastern District of Pennsylvania and that the August 14 date should continue in effect "until such time as the General Assembly of Pennsylvania may enact a Constitutional time limitation in lieu thereof." The case from which the instant appeal arises was commenced by the parties to the Consumer Party decision following proceedings in the Commonwealth Court of Pennsylvania in which papers filed within the August 14 limitation stated in the orders entered in the People's Party and Consumer Party decisions were rejected by the state court as untimely. After several hearings and on the basis of evidence which was not contradicted

and received largely by stipulation, the three-judge court held that the three-week limitation was Constitutional, but that there was no "compelling state interest" which would "warrant the burden on independent candidacies which results from the early filing date." 399 F. Supp. at 1267-68, App. 22-25. The court accordingly entered an order by which the Secretary of the Commonwealth and subordinate election officers were enjoined from enforcing the time limitation as to the classes of independent voters, potential independent candidates, and political bodies supporting such candidacies which plaintiffs had been certified to represent, and requiring the acceptance of nomination papers filed on or before August 21 in each succeeding year, until the Pennsylvania legislature shall act to establish a new limitation.

ARGUMENT

The decision below is manifestly correct and should be affirmed. The matters presented by the Commonwealth as occasions for the appeal are so unsubstantial as not to require further argument.

The Constitutional validity of restrictions placed on the procedures by which independent political candidates obtain ballot position "depends upon whether they are necessary to further compelling state interest . . . ." American Party of Texas v. White, 415 U.S. 767, 780, citing Storer v. Brown, 415 U.S. 724, 729-33.

The instant appellees were certified by the court below as class representatives of three separate classes of independent voters, potential independent candidates, and political

bodies desiring to support such candidates, 399 F. Supp. at 1262 n.4, App. 12 n.4, and had previously been certified as class representatives in the People's Party and Consumer Party decisions. The court below found on the basis of the evidence, and without any disagreement by the Commonwealth:

> "Plaintiffs have shown that the remoteness of the signature gathering period from the general election substantially impairs the ability of plaintiffs' candidates to qualify as eligible independent candidates, and so threatens to keep off the ballot candidates for whom eligible voters wish to cast their vote . . . ."
> 399 F. Supp. at 1266, App. 22.

On this record, the court below was correct to determine the Constitutional validity of the Pennsylvania restrictions by applying to those restrictions the standard reaffirmed in American Party and Storer.

Both in the proceedings below and in this Court, the Commonwealth has failed to point to any state interest, much less a "compelling state interest," which would support the 218 day restriction (244 days in a Presidential year such as 1976). Neither the Jurisdictional Statement nor the Commonwealth's subsequent filings with this Court describe any such state interest.

Notwithstanding the inability of the Commonwealth to define a state interest or suggest to the court below any reason for the 218 day restriction, the cautious opinion of the three-judge court considered carefully--and sua sponte--"three state interests arguably served by the time limit", and found each such interest to be neither compelling nor substantial. 399 F. Supp. at 267-68, App. 22-25. As to an interest based on administrative con-

venience, the court below found that the "evidence reveals" that ballots were not prepared "until the latter part of September" and that a candidate's name "can be added to or removed from the ballots in late September without more than minor inconvenience." 399 F. Supp. at 1267, App. 22-23. On a second possible "compelling interest," the court below recognized that Pennsylvania might validly desire to exclude defeated primary candidates from the independent candidacy ballot process, as was sustained in Storer, but that there were "less restrictive" means of effecting that exclusion than "scheduling the signature gathering period so far in advance of the primary," and accordingly that "the justification for this scheduling cannot be found in the state's compelling interest in divorcing the party primary candidate selection

process from the independent one." 399 F. Supp. at 1267, App. 23-24. As a third possible "compelling interest," the court below considered whether there was any benefit to voters in the primary election from their having knowledge, prior to the primary, of the independent candidates who had filed for a place on the November election ballot. The court below assumed, for purposes of evaluating this interest, that primary election voters would have knowledge of the nomination papers on file at the Secretary of the Commonwealth's office, notwithstanding that no reference to those candidates would appear on the primary election ballot. Even on that assumption, which was not sustained by any evidence in the record and which seems to assume that every citizen has actual knowledge of every paper on file at a Government office if such paper is a public

record, the court below found that the restrictive early filing date would create "what is at best a marginal increase in knowledgeable voting," and that such a "state interest is insufficiently compelling to warrant the burden on independent candidacies which results from the early filing date." 399 F. Supp. at 1268, App. 24-25.

Neither in the court below nor in this Court does the Commonwealth urge that any of the three "state interests" considered by the court below is either "compelling" or "substantial." Nor does the Commonwealth point to any other interest which would justify the restriction.

The issues which the Commonwealth does raise in this Court are so unsubstantial as not to need further argument.

The Commonwealth's principal occasion for this appeal appears to be

based upon a claimed administrative inconvenience created by the fact that the United States District Court for the Eastern District of Pennsylvania acted within its territorial jurisdiction in preparing the Amended Order, 399 F. Supp. at 1269, App. 29-31, so that the injunction is in force only as to classes of independent voters, independent candidates, and political bodies supporting such candidates, located within the Eastern District of Pennsylvania. This administrative inconvenience appears to be largely the creation of the Commonwealth itself, which has chosen to disregard the effect of the Order upon the Secretary of the Commonwealth in her state-wide capacity and, in any event, upon affirmance (or reversal) of the order below, such administrative inconvenience will be obviated because the decision of this

Court will necessarily determine the Constitutionality of the time limitation throughout Pennsylvania.

The Commonwealth's other argument is that another three-judge court, in Williams v. Tucker, 382 F. Supp. 381 (M.D. Pa. 1974), sustained the Constitutionality of the three-week signature gathering period under Section 2913(b). The Williams decision is hardly in conflict with the instant decision, because the court below in the instant case reached the same conclusion:

> "We decline to invalidate the 21 day signature gathering period for nomination papers . . . ." 399 F. Supp. at 1266, App. 21.

As to the time limitation for filing nomination papers, Section 2913(c), the Williams court neither considered nor adjudicated the validity of that provision. In any event, the Williams

decision was carefully considered by the court below in the instant case and carefully distinguished. 399 F. Supp. at 1268, App. "A" at 25-26. Williams involved a "defeated party candidate," an incumbent Congressman who sought the re-nomination of the Republican Party and, after defeat in the primary, sought a second opportunity by filing as an independent candidate. As the court below stated, 399 F. Supp. at 1268, App. 26:

> "The present case, however, involves interests which were not present nor considered in Williams. Plaintiffs herein are precisely those persons whose rights are unnecessarily infringed by the provisions which legitimately barred persons such as Congressman Williams from the ballot . . . ."

The Commonwealth's third contention, that the court below "usurped a legislative function and abused its judicial powers" (Jurisdictional Statement 7), does not require argument subsequent to Marbury v. Madison, 1 Cranch 137.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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